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No. 83-706

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN F. LEHMAN, JR., SECRETARY OF THE NAVY, *et al.*,
Petitioners,

v.

YVONNE G. TROUT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
STATEMENT	2
A. Petitioners' Mischaracterization of Regression Evidence	2
B. Statistical Evidence Showing Post-1972 Discrimination Ignored in Petitioners' Statement	4
C. Non-Statistical Evidence	5
D. 1970-1974 Discrimination to Which Petitioners Stipulated	6
E. Relief Order	7
F. Motion for Reconsideration	7
ARGUMENT	
I. Petitioners seek nothing more than an opportunity to relitigate factual issues decided by the district court under the guise that the district court misapplied the law regarding the burden of proof	8
II. This Court's decision in *Aikens* does not require vacating the court of appeals' decision or summary reversal of the district court's decisions	11
III. The findings of the district court are amply supported by evidence of post-1972 discrimination in petitioners' employment decisions	13
IV. The district court properly compared salaries and careers of men and women, all of whom possessed the relevant minimum objective qualifications	16
V. The district court properly required petitioners to prove nondiscrimination by "clear and convincing evidence" at subsequent relief hearings	17
CONCLUSION	19
APPENDIX A—Memorandum Order of the United States District Court for the District of Columbia, October 20, 1981	1a
APPENDIX B—Memorandum Order of the United States District Court for the District of Columbia, March 10, 1982	14a

TABLE OF AUTHORITIES

CASES: Page

Addington v. *Texas*, 421 U.S. 418 (1979) 18
Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) 4
Baxter v. *Savannah Sugar Refining Corp.*, 495 F.2d 437 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974) 18
Bolling v. *Sharpe*, 347 U.S. 497 (1954) 13
Castaneda v. *Partida*, 430 U.S. 482 (1977) 4, 11
DeMarco v. *United States*, 415 U.S. 449 (1974) 8
Dothard v. *Rawlinson*, 433 U.S. 321 (1977) 11
EEOC v. *American National Bank*, 652 F.2d 1176 (4th Cir. 1981) 19
Hazelwood School District v. *United States*, 433 U.S. 299 (1977) 9, 13, 16, 17
Herman & MacLean v. *Huddleston*, 459 U.S. ——, 103 S.Ct. 683 (1983) 18
International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 (1977) 9, 10, 12, 17, 18
League of United Latin American Citizens v. *City of Salinas Fire Department*, 654 F.2d 557 (9th Cir. 1981) 18
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 9, 12, 13
McKenzie v. *Sawyer*, 684 F.2d 62 (D.C. Cir. 1982) 18
Muntin v. *State of California Parks and Recreation Department*, 671 F.2d 360 (9th Cir. 1982) .. 18
Nanty v. *Barrows Co.*, 660 F.2d 1327 (9th Cir. 1981) 18
Pullman-Standard v. *Swint*, 465 U.S. ——, 102 S.Ct. 1781 (1982) 8, 15
Sledge v. *J.P. Stevens & Co., Inc.*, 585 F.2d 625 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979) 9, 19
Stewart v. *General Motors Corp.*, 542 F.2d 445 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977) 18
Texas Department of Community Affairs v. *Burdine*, 450 U.S. 248 (1981) 9, 11, 12, 13

TABLE OF AUTHORITIES—Continued

	Page
United States v. *United States Gypsum Co.*, 333 U.S. 364 (1948)	8
United States Postal Service Board of Governors v. *Aikens*, 460 U.S. ——, 103 S.Ct. 1478 (1983)	11-13
Valentino v. *United States Postal Service*, 674 F.2d 56 (D.C. Cir. 1982)	16
TREATISES AND PERIODICALS:	
D. Baldus, and J. Cole, *Statistical Proof of Discrimination* (1980)	3
Finkelstein, *The Judicial Reception of Multiple Regression: Studies in Race and Sex Discrimination Cases*, 80 Columbia Law Review 737 (1980)	3
Fisher, *Multiple Regression in Legal Proceedings*, 80 Columbia Law Review 702 (1980)	3
B.L. Schlei and P. Grossman, *Employment Discrimination Law* (2nd ed. 1983)	3
STATUTES AND EXECUTIVE ORDERS:	
Executive Order 9980 (1948)	14
Executive Order 10,590 (1955)	14
Executive Order 10,925 (1961)	14
Executive Order 11,246 (1964)	14
Executive Order 11,478 (1969)	14
Public Law 89-554, 5 U.S.C. Section 7201	14

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Yvonne G. Trout, *et al.*, respectfully request that this Court deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on March 11, 1983.

OPINIONS BELOW

In addition to the opinions cited by petitioners, the opinion of the district court relating to relief proceedings is reported at 31 F.E.P. Cases 281 and appears in Respondents' Appendix ("Res. App.") at 1a-13a. The opinion of the district court denying petitioners' motion

for reconsideration is reported at 28 F.E.P. Cases 658. (Res. App. 14a-21a).

STATEMENT

Petitioners' Statement (Pet. 2-8) fails to set forth properly the evidence of discrimination considered by the trial court. Further, petitioners' Statement omits certain material aspects of the proceedings below.

Respondents' lawsuit alleging class-wide sex discrimination against NAVCOSSACT/NARDAC [1], an agency of the Department of the United States Navy, was tried with three consolidated individual cases before United States District Court Judge Harold H. Greene on June 16-27, 1980.[2] Respondents charged petitioners with engaging in a pattern and practice of sex discrimination in hiring, performance evaluation, job assignment, promotion and award procedures. (Pet. App. 42a). The litigation was lengthy and complex. The district court heard testimony from 42 witnesses and received into evidence more than 7,500 pages of exhibits; the record on appeal consists of five separate volumes, totaling 2,081 pages.

A. Petitioners' Mischaracterization of Regression Evidence

Petitioners' Statement mischaracterizes the regression analyses used in this case. Petitioners' suggestion (Pet. 10) that the district court leaped from the fact that women occupy lower pay grades than men to a finding of discrimination ignores the salary regression analyses that the district court used as part of the basis for its opinion. Multiple regression techniques go far beyond

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[1] The informal administrative charge of continuing pervasive sex discrimination was filed on June 21, 1972. Respondents' class action was filed on January 10, 1973. (Petitioners Appendix ("Pet. App.") 41a).

[2] The Petition for Writ of Certiorari relates to the class action case only.

simple pay-grade comparisons. Statistical analyses of personnel information were performed by experts for both sides, using data furnished from agency records during the course of discovery.[3] (Pet. App. 42a-45a). Multiple regression analysis is "a statistical technique designed to estimate the effects of several independent variables on a single dependent variable" and is well-recognized by the courts in Title VII litigation.[4] Multiple regression analyses are particularly well suited for comparing salaries paid to members of a protected group to those paid to similarly qualified whites or males. By including in the equation variables measuring qualifications, it is possible to estimate the effect of sex identity, independent of the effects of these other factors. The district court concluded that this methodology provides the finder of fact with "the ability to determine how much influence factors such as sex, experience, and education each have had on determining the value" of salary disparity between men and women at NAVCOSSACT/NARDAC. (Pet. App. 43a).

Respondents' multiple regression analyses revealed differences based upon sex in the salaries of equally qualified NAVCOSSACT/NARDAC female and male employees ranging between $2,000 and $3,000 for years 1972 through 1979. (Pet. App. 45 n.14). The district court found that "these differences in salaries were statistically

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[3] Respondents' expert was Mahlon R. Straszheim, Ph. D., a professor of economics at the University of Maryland. Dr. Straszheim has written widely on statistics and labor economics and has been employed as a consultant on Title VII litigation by the U.S. Department of Justice. (Joint Appendix ("JA") 389-394, 1943-1946).

[4] Fisher, *Multiple Regression in Legal Proceedings*, 80 Columbia Law Review 702 (1980); Finkelstein, *The Judicial Reception of Multiple Regression: Studies in Race and Sex Discrimination Cases*, 80 Columbia Law Review 737 (1980); D. Baldus and J. Cole, *Statistical Proof of Discrimination* (1980); B.L. Schlei and P. Grossman, *Employment Discrimination Law* (2nd ed. 1983), pp. 1342-1343.

significant at the .01 level, that is, they would be expected to arise by chance less than one percent of the time if there were no discrimination based on sex." [5] (Pet. App. 45 n.14).

B. Statistical Evidence Showing Post-1972 Discrimination Ignored in Petitioners' Statement

Petitioners' Statement ignores other statistical evidence showing sex discrimination occurring after 1972 presented by respondents upon which the district court based its opinion. Respondents presented separate salary regressions for those persons employed in 1979 who were hired after 1972 as one means of demonstrating the existence of post-1972 discrimination. The district court noted that this evidence demonstrated statistically significant salary differences between men and women for persons hired *after* 1972, a finding which was consistent with the evidence on salary differences for all employees:

> Plaintiffs' expert also performed several variant regressions, including running of the 1979 model using a population of employees hired only since 1972, when Title VII became applicable to federal employees; running of the 1979 model using subpopulations categorized by agency origin within NARDAC; and running of data for both 1977 and 1979 using a logarithmic, rather than a linear, equation. Each of these variants produced *statistically significant* results which were wholly consistent with those of the basic model.

(Pet. App. 45a n.14). (Emphasis added). This finding alone directly refutes petitioners' assertion that there was no post-1972 discrimination.

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[5] This level of statistical significance exceeds the standard required by this Court. *Castaneda* v. *Partida*, 430 U.S. 482, 496-497 n.17 (1977). *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 430 (1975).

Analysis of promotion data offered by respondents showed women were treated less favorably than men, a result regarded by the district court as a "repetition" of evidence reflected in the regression findings. (Pet. App. 45a n.14). The salary regressions and the promotion analysis provide direct evidence of discrimination after 1972.

C. Non-Statistical Evidence

Petitioners' Statement also ignores the role of non-statistical evidence in the findings of fact by the district court. In addition to basing the finding of class discrimination upon respondents' statistical analyses, the district court considered extensive non-statistical evidence—which it found strengthened respondents' claim of discrimination. (Pet. App. 60a). In denying petitioners' motion for reconsideration, the district court observed that the "decision on the class action did not rest solely on statistics; there was also substantial testimony by individuals who were discriminated against to support that decision." (Res. App. 17a n.4).

This evidence included the testimony of numerous present and former employees of NARDAC. (Pet. App. 42a, n.3, 60a). These witnesses testified to the discriminatory denial of promotion for supervisory positions to women, routine assignment of women to lower-level positions, and preselection of men for supervisory positions in violation of federal law. (Pet. App. 60a, n.49, n.50 and n.51). All of the department and division heads at NARDAC (with the exception of one black male) were white males. Of approximately 215 to 220 project leaders, only 6 were women. (Pet. App. 47a, n.18). Petitioners' own witnesses testified concerning agency practices of unlawful preselection and failure to post vacancy announcements in violation of merit promotion regulations. (Pet. App. 61a).

D. 1970-1974 Discrimination to Which Petitioners Stipulated

Additional facts supporting a finding of discrimination were contained in a statement of facts to which both petitioners and respondents stipulated as a result of extensive pre-trial proceedings in 1974 and a lengthy comprehensive pretrial order ("PTO"). These stipulated facts contained admissions of continuing, pervasive, and unlawful discriminatory conduct which, standing alone, are sufficient to support a finding of classwide discrimination. The Navy admitted that the entire management structure engaged in unlawful hiring, promotion, and technical evaluation procedures which favored males. Persons were preselected for promotions, vacancies were not advertised, and a secret technical evaluation system was used to justify promotion of less qualified males.[6]

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[6] The Navy admitted that for an extended period of time the entire management structure engaged in unlawful hiring, promotion, and technical evaluation practices, contrary to the merit principles set forth in 5 C.F.R. § 335.103 *et seq.* (1972). PTO 8-10, 13-18, 26-31. (JA 46-48, 51-56, 64-69). Highest management officials, including the Commanding Officer, civilian Technical Director, Personnel Officer and Department Heads, were involved. PTO 6-40. (JA 44-78). Merit promotion vacancy announcements were usually not publicly posted.

In answers to interrogatories, the Technical Director of NAVCOSSACT admitted that it was routine management procedure at NAVCOSSACT to preselect employees for promotion prior to publication of any vacancy announcement. Employees who applied for any publicized vacancies were not given any consideration since the promotion decision had already been made. By his own admission, the Technical Director would first ask the male department heads "who they would support for promotions" and then make promotion recommendations to the Commanding Officer who would generally acquiesce. PTO 29. (JA 67).

Further, the Technical Director, with the concurrence of the Commanding Officer of NAVCOSSACT, instituted an unlawful, secret technical evaluation system that was used to justify promotion of less qualified males. PTO 38-40. (JA 76-78). Male military and civilian management at the agency routinely hired former military

E. Relief Order

On October 20, 1981, the district court issued a relief order requiring each class member to file a proof of claim showing her employment history, membership in the class and claim for relief. (Res. App. 4a). After the employee files a proof of claim, "the burden shifts to employer to demonstrate by clear and convincing evidence that its employment decisions with regard to that individual were based on legitimate factors unrelated to the policy of discrimination which has already been proved." (Res. App. 5a). The order further provides that "[s]hould the employer succeed in meeting this burden, the employee is entitled to come back with evidence that such legitimate factors were pretextual." (Res. App. 5a).

F. Motion for Reconsideration

On October 30, 1981, petitioners filed a motion for reconsideration on the grounds that "in the course of preparing for the relief proceedings, defendants collected evidence which required that the Court vacate its finding of liability." (Res. App. 15a). The district court denied this motion as untimely because the evidence petitioners sought to introduce "clearly should and could have been presented while the trial was proceeding." (Res. App. 16a). The district court also found that the proffered evidence was "largely cumulative and would be unlikely to produce a different result." (Res. App. 16a). The district court's denial of petitioners' motion for reconsideration was affirmed by the court of appeals. (Pet. App. 19a-21a).

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officers with few professional qualifications as technical employees and unlawfully promoted them over senior qualified female technical employees. PTO 14-15. (JA 52-53).

ARGUMENT

I. Petitioners seek nothing more than an opportunity to relitigate factual issues decided by the district court under the guise that the district court misapplied the law regarding the burden of proof.

Petitioners' first question presented makes no challenge to well-settled legal principles regarding burdens of proof for finding discrimination in Title VII class actions or the role of statistics in establishing or rebutting a *prima facie* case of discrimination. Nor do petitioners suggest that the opinion of the court of appeals is inconsistent with the law in other circuits or that there are significant differences in law among the circuits regarding the proof required to establish that unlawful discrimination exists. Accordingly, petitioners' first question is not worthy of certiorari on grounds either of unsettled law or conflicts among the circuits.

Petitioners' argument that the district court made a legal error in interpreting voluminous statistical evidence is in reality an argument of fact, rather than of law. Complex statistical evidence on these questions was extensively debated at trial by expert witnesses. The district court's findings were reviewed by the court of appeals which concluded that these findings could not be set aside under the "clearly erroneous" standard.[7] In short, petitioners' first question seeks an opportunity to relitigate complex factual contentions that have already been extensively reviewed below. Petitioners simply

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[7] "[F]actfinding is the basic responsibility of district courts, rather than appellate courts." *DeMarco* v. *United States*, 415 U.S. 449, 450 n.* (1974) (per curiam). A district court's findings of fact may be set aside as "clearly erroneous" only when the reviewing court is left with "a definite and firm conviction that a mistake has been committed." *Pullman Standard* v. *Swint*, 465 U.S. ——, 102 S.Ct. 1781, 1788 n.14 (1982), citing *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

disagree with the district court's application of well-settled legal principles to well-reasoned factual findings.

In a pattern-and-practice class action, the plaintiffs must show by a preponderance of evidence that the defendants discriminate against women as part of their regular operating procedures. *Hazelwood School District* v. *United States*, 433 U.S. 299, 307 (1977); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 336 (1977); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

Initially, plaintiffs may make a *prima facie* case, which entitles them to a presumption that defendants have discriminated against the class, by introducing statistical evidence from which the trier of fact can infer discrimination.[8] Statistical evidence alone is sufficient to establish a *prima facie* case of discrimination. *Hazelwood*, 433 U.S. at 307-308. Under *Teamsters*, the defendant can rebut the inference of discrimination created by the plaintiffs' statistics by showing that the statistics are "inaccurate" or by demonstrating that the plaintiffs' disparities shown are statistically "insignificant" or that equally or more appropriate statistical comparisons do not demonstrate any significant disparity between the salaries of similarly qualified men and women. *Teamsters* v. *United States*, 431 U.S. at 338-340, 360 n.20; *Sledge* v. *J. P. Stevens & Co., Inc.*, 585 F.2d 625, 634-636 (4th Cir. 1978), *cert. denied*, 440 U.S. 981. If the defendant cannot dispel the inference of the existence of a pattern and practice of discrimination by attacking plaintiffs' statistical evidence, the court will infer that all class members were victims of illegal discrimination. *Teamsters* v. *United States*, 431 U.S. at 362.

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[8] What establishes a *prima facie* case varies from case to case and is not a rigid formula to be applied without variation. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 802, n.13. The burden of establishing a *prima facie* case is "not onerous." *Burdine* v. *Texas Department of Community Affairs*, 450 U.S. 248, 253 (1981).

The district court carefully applied these well-settled legal principles to voluminous evidence presented by lay and expert witnesses on both sides. The district court found that respondents' multiple regression analyses, as well as other statistical studies, had made a *prima facie* showing of discrimination. The district court felt that it was justified "absent some explanation, to draw the conclusion that equally qualified female employees of NARDAC consistently received lower salaries on average than male employees, and accordingly, that they had been the victims of improper discrimination." (Pet. App. 45a).

The district court found petitioners' attempt to rebut respondents' statistics to be deficient. "[D]efendants did not choose to perform any regressions correcting the specification errors which they claimed afflicted plaintiffs' regressions."[9] (Pet. App. 58a). Further, petitioners chose not to introduce several of their regressions into evidence. (Pet. App. 59a).

The district court also found that cohort analysis, the principal statistical technique used by petitioners, was unsound in theory and defective in execution. Petitioners' cohort analysis divided the data under examination into such small sample groups as to render statistical analysis meaningless and also failed to include many employees of NAVCOSSACT/NARDAC. Thus, the district court properly rejected petitioners' statistical evidence.

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[9] The district judge asked expert witness, Dr. Robert Hall, why petitioners had not introduced a more refined regression analysis to rebut respondents' *prima facie* case. Dr. Hall replied that doing so would be expensive. He continued by stating: "It was something we talked about doing. We had access to the personnel files of the agency and we could have gone into these personnel files, and if they are adequate and I am not sure, if they do have adequate information, we could have started building up a complex linear model." (JA 1921-1923).

The district court carefully considered the statistics presented by petitioners but found that these statistics were not probative of the question of discrimination.[10] The district court specifically held:

> [D]efendants' evidence has not "raise[d] a genuine issue of fact as to whether [they] discriminated against the plaintiff[s]." *Texas Department of Community Affairs* v. *Burdine*, *supra*, 450 U.S. at ——, 101 S.Ct. at 1091. Because defendants have failed to produce evidence that would allow the Court to conclude that they did not unlawfully discriminate, the Court, applying the burden-of-production rule articulated by the Supreme Court in *Burdine*, finds that defendants have not rebutted plaintiffs' *prima facie* case of discrimination.

(Pet. App. 59a). Petitioners simply failed to meet the "evidentiary obligation" imposed by *Burdine*, 450 U.S. at 258.

Petitioners' suggestion that the district court failed to focus on the ultimate question of discrimination is specious. In sum, petitioners seek a writ of certiorari based largely on statistical evidence presented by their experts which the trial court rejected as insufficient to raise a genuine issue of material fact as to the accuracy of the picture painted by respondents' statistics.

II. This Court's decision in *Aikens* does not require vacating the court of appeals' decision or summary reversal of the district court's decision.

Petitioners mistakenly seek to use *United States Postal Service Board of Governors* v. *Aikens*, 460 U.S. ——, 103 S.Ct. 1478 (1983), to obtain an opportunity to relitigate

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[10] The facts here are similar to those found in *Castaneda* v. *Partida* where the petitioner also introduced "practically no evidence." 430 U.S. at 498. *See also Dothard* v. *Rawlinson*, 433 U.S. 321, 331 (1977). As this Court noted in *Burdine*, the defendant cannot meet its burden merely "by argument of counsel." 450 U.S. at 255 n.9.

the facts of this case. (Pet. 13-14). The *Aikens* decision did not redefine burdens of proof in Title VII cases but simply reaffirms well-settled principles of law articulated in *Teamsters*, *McDonnell Douglas*, and *Burdine*. The *Aikens* opinion is silent on the use of statistics in Title VII class actions and does not discuss how lower courts should interpret expert testimony regarding statistics. Accordingly, *Aikens* provides no basis for a reinterpretation of the statistical evidence in this case.

In *Aikens*, a black individual employed by the U.S. Postal Service alleged individual racial discrimination and presented evidence that he possessed the necessary skills for a promotion that was given to a white. However, the district court ruled against Aikens on the basis that he had not offered direct proof of discriminatory intent. The court of appeals reversed, ruling that the district court had erred when it forced respondent to submit direct evidence of discriminatory intent.

This Court agreed with the circuit court that:

> As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves. Thus, we agree with the Court of Appeals that the District Court should not have required Aikens to submit direct evidence of discriminatory intent. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 358 n. 44 (1977) ("[T]he *McDonnell Douglas* formula does not require direct proof of discrimination.").

Aikens, 103 S.Ct. at 1481 n.3. This Court vacated the reversal by the court of appeals only because it could not be certain whether the district court's mistaken view of the law had influenced its findings regarding discrimination.

In this case, the court of appeals, after expressly considering petitioners' arguments and reviewing the rec-

ord, found ample evidence of post-1972 discrimination. (Pet. App. 16a). Thus, it is clear that *Aikens* is inapplicable to the facts of this case.

Petitioners' contention that the lower courts committed fundamental error in failing to focus on the question of discrimination (Pet. 8-9) is entirely imaginary. The lower courts followed well-settled principles of law regarding the burden of proof, reiterating the standards articulated in *McDonnell Douglas* and *Burdine*. Citing the standard in *Burdine*, the district court concluded that the evidence supported the finding that petitioners had discriminated against class members. (Pet. App. 59a). The trial court never lost sight of the requirement that respondents were required to carry the ultimate burden of proving discrimination by a preponderance of evidence. Petitioners simply failed to satisfy the burden of production of evidence, as required by *Burdine*.

III. The findings of the district court are amply supported by evidence of post-1972 discrimination in petitioners' employment decisions.

Having failed to convince the district court that the salary differences between men and women were not caused by sex discrimination, petitioners seek to defend the salary disparity between men and women with the argument that all of the discrimination occurred in the pre-1972 period.[11] The gravamen of petitioners' argu-

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[11] Just as a state employer was subject to the command of the Fourteenth Amendment not to engage in purposeful discrimination, so also was the federal government subject to the command of the Fifth Amendment not to discriminate. *Hazelwood School District* v. *United States*, 433 U.S. at 310, n.16; *Bolling* v. *Sharpe*, 347 U.S. 497, 499-500 (1954).

Even prior to the passage of the Equal Employment Opportunity Act of 1972, Congress specifically provided for nondiscrimination in

ment is that because there is no independent evidence of post-1972 discrimination, statistics which include pre-1972 data may not properly be considered in determining liability. This argument is incorrect.

Petitioners' argument that respondents' multiple regression analysis include pre-1972 employment decisions is based on a failure to understand the evidence at trial. Respondents' regression analyses included four variables—salary, education, experience and sex. No pre-1972 variables showing pre-Act salary relationships are included in these regressions. Respondents' regressions do not imply any assumptions about the fairness of initial grade, initial salary or any pre-1972 condition of employment because these variables are *excluded.* (J.A. 360-382).

Regressions were performed for each of the years 1972 through 1979. These regressions explain differences in salary and rates of promotion between men and women for each year from 1972 through 1979 and do not, contrary to petitioners' assertions, measure pre-1972 salary relationships.

Petitioners' argument runs counter to the immense factual record before the trial court. Respondents offered probative evidence of post-1972 discrimination by examining salary disparities in 1979 only for those persons entering NARDAC *after* 1972, which included more than half of all persons employed in 1979. The district court noted that these results were wholly consistent with the results of the basic model.

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federal employment. Pub. L. 89-554, now codified at 5 U.S.C. Section 7201. Executive Orders 9980 (1948), 10,590 (1955), 10,925 (1961), 11,246 (1964) and 11,478 (1969) also assured the right of federal employees to be free from discrimination prior to the passage of the 1972 Act.

> Plaintiffs' experts also performed several variant regressions, including running of the 1979 model using a population of employees *hired only since 1972*, when Title VII became applicable to federal employees; running of the 1979 model using subpopulations categorized by agency origin within NARDAC; and running of data for both 1977 and 1979 using a logarithmic, rather than a linear, equation. Each of these variants produced *statistically significant* results which were *wholly consistent* with those of the basic model. (Emphasis added).

(Pet. App. 45a n.14). Petitioners' assertion that there is no evidence of post-1972 discrimination in the record (Pet. 3, n.2) is contradicted by the plain, unambiguous statement of the district court. The court of appeals also rejected petitioners' argument that the record contained no evidence of post-1972 discrimination. The court stated: "[T]here is no doubt whatsoever that the plaintiffs' satistical analysis included a substantial amount of data concerning post-1972 employment decisions affecting class members." (Pet. App. 16). Thus, petitioners' reliance on *Aikens* is misplaced.

In light of extensive statistical and eyewitness testimony supporting a finding of pattern and practice discrimination against the class, "the record permits only one resolution of the factual issue[s] in this lawsuit." *Pullman-Standard* v. *Swint*, 102 S.Ct. at 1792. Where the record contains ample evidence of post-1972 discrimination (including the stipulated facts in the pretrial order) and where the district court found evidence of post-1972 discrimination to be probative and where petitioners failed to present sufficient evidence to even create "a genuine issue of fact" on the issue of discrimination, this Court should not grant certiorari to allow petitioners to relitigate facts already subjected to an intensive review by the court of appeals.

IV. The district court properly compared salaries and careers of men and women, all of whom possessed the relevant minimum objective qualifications.

Neither petitioners nor respondents dispute the law that when special qualifications are required to fill the jobs at issue, the relevant statistical comparisons must be among those who possess those qualifications. *Hazelwood School District* v. *United States*, 433 U.S. at 308. Yet petitioners seek to use *Hazelwood* to lead the Court into a factual inquiry into the statistical evidence presented at trial and into an esoteric debate over proxy variables in multiple regression analysis. (Pet. 15). This inquiry is unnecessary because the lower courts fully considered petitioners' claims.

The plaintiff class certified by the district court consisted entirely of female technical professional employees, all of whom performed computer-related tasks. (Pet. App. 14a, 41a). Each class member has at least three years of general experience. (Pet. App. 14a). Petitioners' decisions to assign each class member to a technical or professional position is an admission that each has the minimum objective qualifications for holding her job.[12]

The court of appeals rejected petitioners' claim that respondents' statistics did not account for minimum objective qualifications, noting that respondents' statistics were based on a homogeneous class of occupations. (Pet. App. 12a-14a). The requirement of measuring minimum objective qualifications when data from diverse occupational groups is pooled, as in *Valentino* v. *United States Postal Service*, 674 F.2d 56 (D.C. Cir. 1982), is not present in the instant case. In fact, the district court's opinion in *Trout* was specifically approved in *Valentino*. 674 F.2d at 68, 70, 71 n.26.

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[12] Petitioners never raised this issue at trial and there is no evidence in the record to suggest that any class member lacks the minimum objective qualifications for her job.

In sum, the *Hazelwood* requirements were met by the class definition and were built into the multiple regression analyses that form one of the bases for the trial court's finding of liability.[13]

V. The district court properly required petitioners to prove nondiscrimination by "clear and convincing evidence" at subsequent relief hearings.

Following this Court's analysis in *International Brotherhood of Teamsters*, 431 U.S. at 361-362, the district court held that the force of proof of a policy of discrimination "does not dissipate at the remedial stage." (Res. App. 4a). The "finding of discrimination with regard to the class affords the members of the class a presumptive entitlement to relief." (Res. App. 4a). The district court also ruled that once the individual class member meets her initial burden of coming forward with a proof of claim,[14] the burden of proof shifts to the employer to "demonstrate by clear and convincing evidence that the employment decisions with regard to that individual were based on legitimate factors unrelated to the policy of discrimination which has already been proved." (Res. App. 5a).

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[13] Judge MacKinnon in dissent also rejected petitioners' argument that respondents' statistics should specifically account for the minimum objective qualifications of each class member for each job. Judge MacKinnon "defer[red] to the district court's determination, upheld by the opinion for the court, that plaintiffs' statistical proxies adequately reflected the minimum objective qualifications." (Pet. App. 35a, n.12).

[14] At the relief stage, each class member will be required to submit a proof of claim showing her employment history, membership in the class, and claim for relief. Petitioners will then have an opportunity to show that some members of the class fail to meet qualifications for specific promotions, thus eliminating any possibility that a particular class member may gain unfair advantage. (Res. App. 5a-8a).

The court of appeals affirmed the decision placing on petitioners an affirmative burden of proving an absence of discrimination by "clear and convincing evidence." (Pet. App. 21a-22a). The court relied on its opinion in *McKenzie* v. *Sawyer*, 684 F.2d 62, 77-78 (D.C. Cir. 1982), which provides that a finding of class liability requires defendants, as proven discriminators, to carry a heavier burden of proof in subsequent relief hearings. (Pet. App. 21a-22a).

The "clear and convincing evidence" standard flows logically from this Court's decision in *Teamsters* v. *United States*, 431 U.S. at 361-362. This Court has often "required proof by clear and convincing evidence where particularly important interests or rights are at stake." *Herman & MacLean* v. *Huddleston*, 459 U.S. ——, 103 S.Ct. 683, 691 (1983). A preponderance of evidence standard is appropriate only where both parties should "share the risk of error in roughly equal fashion." *Id.* 103 S.Ct. at 692, citing *Addington* v. *Texas*, 421 U.S. 418, 423 (1979).

The holding below of a "clear and convincing evidence" standard is entirely consistent with the rulings of the other courts of appeal that have considered this issue.[15] *E.g.*, *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, 444-445 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974). *Stewart* v. *General Motors Corp.*, 542 F.2d 445, 453 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977).

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[15] The Ninth Circuit also imposes a heavier burden on defendants at the relief stage of individual Title VII cases where the employer has been found guilty of discrimination. Such proven discriminators are required to prove by "clear and convincing evidence" that the victim of discrimination would not have been hired in the absence of discrimination. *League of United Latin American Citizens* v. *City of Salinas Fire Department*, 654 F.2d 557, 559 (9th Cir. 1981); *Nanty* v. *Barrows Co.*, 660 F.2d 1327, 1333-1334 (9th Cir. 1981); *Muntin* v. *State of California Parks and Recreation Department*, 671 F.2d 360, 363 (9th Cir. 1982).

Petitioners assert that there is a conflict in the appellate courts, relying on *dictum* in *Sledge* v. *J.P. Stevens & Co., Inc.*, 585 F.2d at 637 and *EEOC* v. *American National Bank*, 652 F.2d 1176, 1201 (4th Cir. 1981). But the issue of the defendant's burden of proof in relief hearings was not presented in *Sledge* since plaintiffs' claims had been precluded prior to the relief hearings, and the court of appeals gave no indication that it had considered and refused to follow the rule established in all circuits that have actually ruled on the question. The Fourth Circuit's brief statement in *EEOC* v. *American National Bank* repeating the *dictum* from *Sledge* is equally devoid of any indication that that court is intentionally diverging from the rule followed in other circuits. 652 F.2d at 1201. In sum, there is no conflict in the circuits sufficient to warrant review in this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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December 8, 1983

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 73-0055

YVONNE G. TROUT, *et al.*,
Plaintiffs,
v.
EDWARD HIDALGO, *et al.*,
Defendants.

Civil Action No. 76-1206

MARIE LOUISE BACH, *et al.*,
Plaintiffs,
v.
EDWARD HIDALGO, *et al.*,
Defendants.

[Filed Oct. 20, 1981]

MEMORANDUM ORDER

By its Opinion and Order of April 16, 1981 (as amended on May 8 and May 26, 1981), this Court directed the parties to submit memoranda concerning the relief issues in these consolidated cases.[1] The Court held,

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[1] Originally four actions were consolidated for trial: *Trout* v. *Hidalgo*, No. 73-0055; *Hardy* v. *Hidalgo*, No. 76-0315; *Bach* v. *Hidalgo*, No. 76-1206; and *Trout* v. *Hidalgo*, No. 78-1098. The Court, in its Opinion and Order of April 16, 1981, dismissed Nos. 76-0315 and 78-1098, and the plaintiffs in those actions are not entitled to relief. See n. 9, *infra*.

after a lengthy trial on the merits, that defendants violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, by engaging in a pattern and practice of sex discrimination with regard to performance evaluation, job assignments, promotion, and award procedures against a class of employees consisting of all female professional technical employees employed by the Naval Command Support Activity (NAVCOSSACT) or by the Navy Regional Data Automation Center (NARDAC) at any time between June 6, 1972 and June 4, 1979. Judgment was entered in favor of the class, and also in favor of two individual plaintiffs with regard to their private Title VII claims.[2] This memorandum concerns the kind of relief to which the prevailing plaintiffs are entitled, and the procedures by which that relief is to be determined.

I

Title VII authorizes a court to award backpay to a plaintiff where the court has found that the employer "has intentionally engaged in or is intentionally engaging in an unlawful employment practice." 42 U.S.C. § 2000e-5(g). The Supreme Court has noted the "obvious connection" between backpay and the objectives of Title VII, and has concluded that "given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1974). Defendants have offered, and the Court can find, no reason why, as a general proposition, backpay should be denied to the plaintiffs in this case; although defendants have reserved the right to appeal the Court's holding of liability, they

[2] One of these individual plaintiffs, Marie Bach, is not a member of the class, while the other, Clara Perlingiero, is a member.

do not appear to dispute its authority to award relief in the form of backpay to individual class members should liability be upheld. The issue before the Court, therefore, is not whether backpay is justified, but rather, the manner in which backpay is to be awarded to individual discriminatees.

This issue encompasses two conceptually distinct questions: first, who within the class is entitled to receive backpay, and second, how are the amounts of the backpay awards to be calculated. Plaintiffs argue that both of these questions can and should be answered through application of multiple regression analyses [3] of the type upon which plaintiffs' experts relied at trial and which the Court found sufficient to support liability. It is clear, and plaintiffs appear to concede, that a classwide, statistical approach to the question of backpay eligibility (as opposed to the amount of the award) would result in the award of backpay to some class members whose advancement either has never been restrained or has been impeded for reasons other than unlawful discrimination. The statute provides, however, that

> [n]o order of the court shall require . . . the payment to [an individual] of any backpay, if such individual . . . was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin.

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[3] Multiple regression is

> a statistical technique designed to estimate the effects of several independent variables on a single dependent variable . . . [T]he methodology provides the ability to determine how much influence factors such as sex, experience, and education each had had on determining the value of a variable such as salary level. Opinion of April 16, 1981, p. 4.

The analyses performed by plaintiffs' experts showed that, taking into account prior experience and education, female employees received substantially lower salaries than male employees.

42 U.S.C. § 2000e-5(g); see also *Day* v. *Matthews*, 530 F.2d 1083, 1085 (D.C. Cir. 1976). Courts have uniformly held that after a pattern and practice of discrimination by an employer against a class of employees has been proved, the entitlement or eligibility of class members to relief must be determined on an individualized basis, in order to assure that the employer's decisions with regard to particular class members were indeed discriminatorily based. See, *e.g.*, *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 357-59 (1977); *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747, 772 (1976); *Mitchell* v. *Mid-Continental Spring Co. of Kentucky*, 583 F.2d 275 (6th Cir. 1978); *Wells* v. *Meyer's Bakery*, 561 F.2d 1268, 1274 (7th Cir. 1977); *Stewart* v. *General Motors Corp.*, 542 F.2d 445, 452-53 (7th Cir. 1977); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 259 (5th Cir. 1974).

This does not mean, of course, that each member of such a class must set out to prove a case of discrimination from scratch. After an employer's policy of discrimination has been proved, "the force of that proof does not dissipate at the remedial stage." *Teamsters* v. *United States*, *supra*, 431 U.S. at 361. The finding of discrimination with regard to the class affords to the members of the class a presumptive entitlement to relief. *Teamsters* v. *United States*, *supra*, 431 U.S. at 362; *Pettway* v. *American Cast Iron Pipe Co.*, *supra*, 494 F.2d at 259. But the law does place an initial burden on the individual class member to come forward, give a history of his employment with the defendant, and list the assignments or opportunities denied to him due to discrimination. *Stewart* v. *General Motors Corp.*, *supra*, 542 F.2d at 453; see also *Teamsters* v. *United States*, *supra*, 431 U.S. at 362; *Pettway* v. *American Cast Iron Pipe Co.*, *supra*, 494 F.2d at 259.[4] Once this is done, however,

[4] Under the *Teamsters* case, a class member is not required to show that he actually applied for an opening in order to qualify for

the burden shifts to the employer to demonstrate by clear and convincing evidence that its employment decisions with regard to that individual were based on legitimate factors unrelated to the policy of discrimination which has already been proved. *Stewart* v. *General Motors Corp., supra*, 542 F.2d at 453. Should the employer succeed in meeting this burden, the employee is entitled to come back with evidence that such legitimate factors were pretextual. *Teamsters* v. *United States, supra*, 431 U.S. at 362 n.50.

Once it is determined on an individualized basis which members of the class have in fact been harmed by unlawful discrimination and are accordingly entitled to backpay, class-wide procedures may be used for computation of the amount of backpay to which these class members are entitled. Such procedures have been held to be especially appropriate where the utilization of an individualized method of calculation would lead the court into a "quagmire of hypothetical judgments" due to the "class size or the ambiguity of promotion or hiring procedures or the illegal practices continu[ing] over an extended period of time." *Pettway* v. *American Cast Iron Pipe Co., supra*, 494 F.2d at 261; *accord, Wells* v. *Meyer's Bakery, supra*, 561 F.2d at 1274; *Stewart* v. *General Motors Corp., supra*, 542 F.2d at 452; see also *Kirby* v. *Colony Furniture Co., Inc.*, 613 F.2d 696, 705-706 (8th Cir. 1980). One class-wide method for computing backpay awards discussed approvingly by the Courts of Appeals for the Fifth and Seventh Circuits is the "compatibility" or "representative employee earnings" formula. Under such an approach

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the presumptive entitlement to relief. "When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a [futile] gesture, he is as much a victim of discrimination as is he who goes through the motions of submitting an application." 431 U.S. at 365-66. Such a nonapplicant must show, however, that he would have applied had it not been for the employer's discriminatory practices. *Id.*

> Approximations are based on a group of employees, not injured by the discrimination, comparable in size, ability, and length of employment—such as adjacent persons on the seniority list or the average job progress of persons with similar seniority—to the class of plaintiffs.

Pettway v. *American Cast Iron Pipe Co.*, *supra*, 494 F.2d at 262; *Stewart v. General Motors Corp.*, *supra*, 542 F.2d at 453; *Bowe v. Colgate-Palmolive Co.*, 489 F.2d 896, 902 (7th Cir. 1973). The Court views plaintiffs' recommended class-wide approach to the computation of backpay—which "uses salary regressions to calculate the earnings of men with years of experience equal to that of each woman, and awards each woman the estimated salary difference" [5]—as closely approximating a "comparability" approach as described above.

II

Applying these principles to the case at bar, the Court will direct the following procedures to be implemented for the determination of backpay awards. Plaintiffs' counsel shall forthwith forward to all class members who can be located a notice and claim form. This form should request the following information: the individual's employment history with NAVCOSSACT or NARDAC (in-

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[5] Plaintiffs' Memorandum on Estimation of Relief, Appendix A, p. 3.

Defendants strongly dispute the use of plaintiffs' statistical techniques in the relief phase, and claim them to be inaccurate and misleading. They concede, however, that their present criticism does not differ markedly from their attacks on plaintiffs' statistical analyses throughout the trial. Defendants' Memorandum in Response to Court's April 16, 1981 Opinion and Order, p. 8. The Court found plaintiffs' techniques to have sufficient validity to withstand these criticisms at trial, and defendants have proffered no convincing arguments that would cause the Court to reconsider at the present stage.

cluding the positions held by the employee, grade levels, and salaries); employment decisions by defendants which the employee claims were adverse to her, or opportunities which the employee claims were denied to her for discriminatory reasons; and any other information with regard to the employee's education or other qualifications that she might choose to volunteer.[6] Any individual member of the class who wishes to be considered for backpay eligibility will be required to submit this completed form to the Court no later than thirty days from the date of this Memorandum.

With the submission of this completed form, a class member will be deemed to have met her initial burden of proof under the principles outlined above.[7] The Court will refer these individual claims either to a United States Magistrate or to a Special Master (depending upon the number of claims at issue) for the holding of hearings at which defendants will be afforded the opportunity to show that the decisions made with regard to each claimant were based on reasons other than unlawful discrimination, and each claimant will have the opportunity to rebut any such showing on the grounds of

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[6] Defendants shall provide to the members of the class free access to their personnel files to enable them to collect the necessary information.

If a class member claims to have been denied a promotion, assignment, or other such opportunity but no record exists of an application for such an opportunity, she should include specific and detailed evidence, by way of affidavit or otherwise, that she would have applied for the position or opportunity were it not for the deterrent effect of defendants' discriminatory practices and policies.

[7] It is hoped by the Court that at this point the majority of the claims will be settled through negotiations between the government and the individual claimants through their counsel. For those claims still outstanding, however, the remainder of the above procedures will be instituted.

pretext.[8] See 42 U.S.C. § 2000e-5(f)(5); Rule 53, Federal Rules of Civil Procedure.

Where the Magistrate or Special Master finds defendants unable to rebut the presumption in favor of a class member's entitlement to relief, he shall rely upon the table contained in Appendix A and the Supplement to Appendix A of Plaintiff's Memorandum to calculate the amount of backpay to which the class member is entitled. The backpay tables submitted by plaintiffs merit further comment in two respects.

First, Tables A-2 and A-3 compute backpay awards for a period from July 1, 1970 to June 30, 1972. An award of backpay for that period would, in effect, augment the remedies made available to federal employees by the 1972 amendments to the Civil Rights Act as interpreted by the Court of Appeals for this Circuit, which has held that the remedies available to federal employees under section 717(c) of the Equal Employment Opportunities Act of 1972 (42 U.S.C. § 2000e-16(c), effective as of March 24, 1972) apply to discrimination occurring before the effective date of the Act only where judicial or administrative proceedings were pending as of that date.[9]

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[8] With regard to Yvonne Trout and Charlene Hardy—both of whom are members of the class and both of whose private discrimination claims were denied—any submission of a notice and claim form would be futile, since the government has already shown at trial, and the Court has already found, that any adverse treatment of them was supported by reasons apart from sex discrimination. See *Sledge* v. *J. P. Stevens & Co., Inc.*, 585 F.2d 625, 638 (4th Cir. 1978).

[9] *Klapac* v. *McCormick*, 640 F.2d 1361, 1366-67 (D.C. Cir. 1981); *Womack* v. *Lynn*, 504 F.2d 267, 269 (D.C. Cir. 1974). But, as stated by the Supreme Court in *Hazelwood School District* v. *United States*, 433 U.S. 299, 309 n.15),

> This is not to say that evidence of pre-Act discrimination can never have any probative force. Proof that an employer engaged in racial discrimination prior to the effective date of

Since proceedings in this case were not begun until after March 24, 1972, the Magistrate or Special Master may not include in his final awards backpay relating to employment before that date.

Second, the statistical methodology used by plaintiffs' experts to compute backpay differs somewhat from that approved by the Court as a basis for liability. The statistical analysis presented at trial, introduced to prove that discrimination existed, relied upon linear equations, whereas the regressions used by plaintiffs to approximate the salary structure of men and women as a basis for establishing backpay awards are based on logarithmic equations. It is not entirely clear from the submissions of the parties which of the two approaches would result in the calculation of more equitable backpay awards. Plaintiffs merely state that a logarithmic approach is preferable because it provides larger awards to persons at higher grades and more experience, consonant with the evidence that promotion to the upper grades is the source of the largest salary differential between men and women employed by defendants;[10] defendants merely assert that plaintiffs are changing the form of their regression analysis in mid-stream only because it happens now to be to their advantage.[11] These arguments do not enable the

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Title VII might in some circumstances support the inference that such discrimination continued.

In the liability phase of the present action, the Court indeed took into account the effects of pre-Act discrimination as they affected post-Act salary differentials. Opinion of April 16, 1981, p. 8.

[10] Plaintiffs' Memorandum Addressing Relief, p. 16; Appendix A, p. 3, 25.

[11] Defendants' Reply Memorandum, p. 14. Defendants have also submitted their own regression analysis for relief purposes; but since these regressions improperly take into account variables such as starting grade, which are under the control of the discriminating employer, they must be rejected. See Opinion of April 16, 1981, pp. 9, 17-18.

Court at this time to resolve which of these two forms would provide the better relief. For that reason, the Court will refer the choice between these two forms of regressions to the Magistrate or Master charged with their application. He may hold further hearings or require further briefings by the parties to aid in his determination which of the two forms might result in the more accurate approximation of the injury suffered by the class of discriminatees.

III

Plaintiffs also ask for injunctive relief prohibiting discrimination of the type practiced in the past by defendants, and imposing upon them affirmative future goals serving to reduce hereafter the disparity in salaries and promotions. They propose that promotion objectives be established for the next three years by specifying a target percentage of women at upper grade levels (or, in the alternative, that future promotion rates for women be set at the same multiple as that of men for the same period). To encourage the agency to meet these goals, plaintiffs propose a rather novel "front pay" approach, in which regression analysis would be applied to the future so as to compensate for any shortfalls in defendants' meeting their promotion goals.

Although relief in the form of goals or quotas has been approved by many appellate courts (see *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978)), courts have generally agreed that such relief is "appropriate only under limited and compelling circumstances." *Sledge* v. *J. P. Stevens, supra*, 585 F.2d at 646; *United States* v. *Chicago*, 549 F.2d 415, 437 (7th Cir. 1977); *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420, 427 (2d Cir. 1975). Courts have been particularly reluctant to order promotion quotas, primarily because of the possibility of injuring blameless majority-group members through re-

verse discrimination. See Schlei & Grossman, *Employment Discrimination Law* 1211 (1976), 332-33 (1979 Supp.); see also *Kirkland* v. *New York State Department of Correctional Services, supra,* 520 F.2d at 427 (discussing the hazards of reverse discrimination). Where effective relief can otherwise be afforded, the preference is to avoid the imposition of quotas. *Sledge* v. *J. P. Stevens, supra,* 585 F.2d at 646.

The Court finds no compelling need here for the imposition of a goal or a quota for future promotions. Class members will be compensated for the injuries suffered from past discrimination through the backpay procedures outlined above, and the Court is able satisfactorily to ensure that defendants maintain a non-discriminatory course in the future by less drastic means than a system of promotion quotas. For a period of the next three years, NARDAC will be required to maintain its promotion files, and to report to the Court on a semi-annual basis upon the results of its promotion actions. See *Teamsters* v. *United States, supra,* 431 U.S. at 361. During that period, the Court will maintain jurisdiction over the action in order to monitor defendants' performance and ensure equal opportunity in the future. See *Watkins* v. *Washington,* 472 F.2d 1373, 1377 (D.C. Cir. 1972).

IV

Remaining is the relief to be awarded to the two individuals who prevailed in their private claims at trial, Marie Bach and Clara Perlingiero. On the basis of the evidence and the findings of the Court and after consideration of the parties' memoranda, the following relief will be ordered for Marie Bach: (a) retroactive promotion to a GS-14 as of March 13, 1976, and to a GS-15 as of May 8, 1978;[12] (b) restoration to the duties, respon-

[12] Defendants claim that Ms. Bach merits no higher than a GS-13 which is the grade from which she was demoted in 1979. This, however, ignores the Court's findings that Ms. Bach was twice re-

sibilities and functions of a GS-15 security manager; (c) backpay, consisting of (i) the difference between the GS-13 salary she earned and the GS-14 salary she would have earned during the period between March 13, 1976 and May 7, 1978, and (ii) the difference between the GS-13 salary she earned and the GS-15 salary she would have earned from May 9, 1978 until such date as she receives her promotion to GS-15; (d) restoration of her performance evaluations from 1975-1976 to that of "outstanding"; and (e) reasonable costs and attorney's fees.

The relief to Clara Perlingiero shall be as follows: (a) retroactive promotion to a GS-13 as of September 1, 1971 through November 26, 1972, and to a GS-14 as of September 1, 1979;[13] (b) backpay, consisting of the larger of (i) the amount she would receive as a member of the class under the class backpay procedure, *supra*, or (ii) the difference between the GS-12 salary she earned and the GS-13 salary she would have earned from September 1, 1971 until November 26, 1972, plus the difference between the GS-13 salary she earned and the GS-14 salary she would have earned from September 1, 1979 until such date as she receives her promotion to GS-14; (c) substantial career development training in the area

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moved from positions of responsibility for which she was qualified, and that defendants failed to classify her position at a grade comparable to that of other security specialists in the Navy with similar functions. Opinion of April 16, 1981, pp. 24-25.

[13] Plaintiffs request that Ms. Perlingiero be promoted to GS-15 as of September 1, 1971, because on that date a reorganization took place causing a white male to be placed in a supervisory role over her at a GS-15 level. There is no basis in the record from which to infer that, had there been no discrimination, Ms. Perlingiero would have been promoted three grades (from a GS-12 to a GS-15), however. On the other hand, defendants' contention that Ms. Perlingiero should be given no promotion from her present grade of a GS-13 fails to take into account the Court's findings that when she was made project leader in September of 1979, she was not given the GS-14 rank that her male predecessor had possessed. See Opinion of April 16, 1981, pp. 26-28.

of telecommunications and in areas that will enable her to meet the new standards in the GS-334 series; (d) upgrading of her performance evaluations from January 1, 1972 to the present so as to place her within the upper third of her grade class; and (e) reasonable costs and attorney's fees.

V

For the reasons stated above, it is this 19th day of October, 1981,

ORDERED That plaintiffs' counsel shall prepare a notice and claim form as outlined in the above Memorandum, and that he shall send such form forthwith to all class members who can be located; and it is further

ORDERED That any member of the class wishing to be considered for backpay eligibility submit to the Court a completed notice and claim form no later than thirty days from the date of this Order; and it is further

ORDERED That defendant NARDAC shall maintain its promotion files through October 1, 1984, and shall report to the Court twice each year during this period (on April 1 and October 1) on the results of its promotion actions; and it is further

ORDERED That defendants shall afford relief to plaintiffs Marie Bach and Clara Perlingiero as outlined in Part IV of the above Memorandum.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 73-0055

YVONNE G. TROUT, *et al.*,
Plaintiffs,

v.

JOHN F. LEHMAN, JR., *et al.*,
Defendants.

Civil Action No. 76-1206

MARIE LOUISE BACH, *et al.*,
Plaintiffs,

v.

JOHN F. LEHMAN, JR., *et al.*,
Defendants.

Civil Action No. 78-1098

YVONNE G. TROUT,
Plaintiff,

v.

JOHN F. LEHMAN, JR., *et al.*,
Defendants.

[Filed Mar. 10, 1982]

MEMORANDUM ORDER

I

Trial on these cases was held from June 16, 1980 to June 27, 1980. During that ten-day trial, the Court heard numerous witnesses, including several experts who provided thorough and detailed evidence on the statistical aspects of the class action. On April 16, 1981, the Court issued a twenty-page opinion which, in exhaustive detail, discussed the issues and the evidence, with particular emphasis on the question of defendants' liability with respect to the class. See *Trout* v. *Hidalgo*, 517 F. Supp. 873 (D.D.C. 1981). Thereafter, the Court directed the parties to submit memoranda on the relief issues flowing from the previous findings of liability, and on October 20, 1981, a Memorandum Order was issued setting forth the kind of relief to which the prevailing plaintiffs would be entitled and the procedures by which that relief is to be determined.

On October 30, 1981, the government moved for reconsideration of the April 16 decision, and it is that motion which is presently before the Court.[1] The basic thrust of the motion is that, in the course of preparing for the relief proceedings, defendants collected evidence which requires that the Court vacate its finding of liability and enter judgment instead in favor of defendants. This motion will be denied, for a number of different reasons.

First. These cases have been in this Court for many years, one of them dating back to January 1973. During that period, the government had ample opportunity to collect evidence and otherwise to prepare its case. Indeed, as the trial record shows, the government was fully prepared, and it was permitted to adduce evidence without

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[1] The government also noted an appeal. On February 8, 1982, at the government's request, the time for filing its appellate brief was stayed by the Court of Appeals pending decision by this Court of the motion for reconsideration.

restriction from the Court. It is not at all clear why the Court should reopen the trial twenty months after its completion to hear evidence that clearly should and could have been presented while the trial was proceeding.[2]

The government's request is more akin to a demand for a new trial than for reconsideration (see, *e.g.*, *Safeway Stores, Inc.* v. *Coe*, 136 F.2d 771 (D.C. Cir. 1943)), but in any event it has failed to satisfy the diligence requirements for relief from the judgment. See *Johnson Waste Materials* v. *Marshall*, 611 F.2d 593, 597 (5th Cir. 1980); *Good Luck Nursing Home, Inc.* v. *Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980); *Carr* v. *District of Columbia*, 543 F.2d 917, 925-27 (D.C. Cir. 1976); *Tobacco Road* v. *City of Novi*, 490 F. Supp. 537, 549 (E.D. Mich. 1980); *Bell Telephone Laboratories, Inc.* v. *Hughes Aircraft Co.*, 422 F. Supp. 372 (D. Del. 1976); 6A Moore's Federal Practice ¶ 59.08[3] (1979); 7 Moore's Federal Practice ¶ 60.23[4] (1979).[3]

Second. The evidence now being proffered is largely cumulative and would be unlikely to produce a different result. That evidence once again reflects defendants' position that women were not disadvantaged in their initial placement in the agency; that pre-Title VII activities may not be considered in Title VII actions for any pur-

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[2] The evidence now proffered clearly is not of the type that by means of due diligence would not have been available at the time of trial. Defendants' repeated insistence that they collected this evidence as part of their involvement with the relief issues does not address the question as to why this evidence, if it bears on liability, was not produced when the liability phase of these actions was tried.

[3] Under Rule 59, Fed. R. Civ. P., a party has only ten days from the entry of a judgment to move for a new trial. Clearly, defendants did not satisfy this ten-day time limitation. Moreover, to take advantage of the more liberal time standard under Rule 60(b)(2), Fed. R. Civ. P., defendants must make a somewhat stronger showing than under Rule 59 that the evidence could not have been discovered by due diligence. 7 Moore's Federal Practice ¶ 60.23[4] at 273.

pose or under any theory; that the "snapshot" method of statistical analysis and defendants' own regression analysis better reflect the actual situation than the regression analysis employed by plaintiffs' expert; and that no discrimination was proved with respect to the two individual plaintiffs who prevailed. All of these contentions were fully considered by the Court when it rendered its April 16, 1981 decision; the government is not entitled to a reopening of the trial for the receipt of additional evidence on these much-litigated issues.[4]

Third. While conceding that it "is in everyone's interest to resolve this matter as expeditiously as possible" (Defendants' Memorandum of Points and Authorities, p. 21), defendants would nevertheless have the Court retry the liability issues which were laid to rest twenty months ago. They reason that a finding of no discrimination would eliminate any requirement for relief proceedings; after reopening the trial, the Court "will then be able to move this matter towards ultimate resolution by correction of the errors" and that "there is much that remains to be resolved" (Defendants Memorandum, p. 21). These arguments are wholly unpersuasive. To be sure, if the Court dismissed these actions, there would be no need for relief proceedings; but there is simply no warrant in the evidence for such a course. It is equally true that much remains to be done—*i.e.*, consideration of the details of the relief. Resolution of that subject matter is hardly advanced, however, by yet another trial on liability.

Fourth. Defendants also raise an issue as to the burden of proof to be imposed at the individual relief hearings. In its October 20, 1981 Memorandum Order the Court held that each individual class member would have

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[4] Moreover, the Court's decision on the class action did not rest solely on statistics; there was also substantial testimony by individuals who were discriminated against to support that decision. See *Trout* v. *Hidalgo*, *supra*, 517 F. Supp. 873.

the burden of coming forward, giving the history of his employment with the agency, and listing the assignments or opportunities that were denied as a consequence of discrimination. Once this was done, the burden would then shift to the agency to demonstrate by clear and convincing evidence that its employment decisions with regard to such individual were based on legitimate factors unrelated to the policy of discrimination. Citing *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), defendants argue that the Court has placed too onerous a burden on them.

The Supreme Court in *Burdine* reiterated what had always been the law in this Circuit: that the plaintiff retains the burden of persuasion. *Bundy* v. *Jackson*, 641 F.2d 934, 951 (D.C. Cir. 1981). *Burdine* holds that once plaintiff has established a prima facie case, the burden shifts to the defendant to produce "evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason."[5] 450 U.S. at 254. Accord *Aikens* v. *United States Postal Service*, 665 F.2d 1057 (D.C. Cir. 1981); *Bundy* v. *Jackson*, *supra*, 641 F.2d 934; and *Day* v. *Mathews*, 530 F.2d 1083 (D.C. Cir. 1976).

The Supreme Court's clarification of the burden of proof at the liability stage has nothing to do with the burden appropriately to be imposed at the relief stage of a case in which classwide discrimination has been found. Once a court has determined that an employer has discriminated against class members, the individual discriminatee should not be forced to prove discrimination in his or her individual case all over again. See *Nanty* v. *Barrows Co.*, 660 F.2d 1327, 1333 (9th Cir. 1981); *League of United Latin American Citizens* v. *City of Salinas Fire Department*, 654 F.2d 557, 559 (9th Cir.

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[5] If defendant satisfies this burden, plaintiff is of course given the opportunity to prove the defendant's reasons were mere pretexts.

1981); *Taylor* v. *Teletype Corp.*, 648 F.2d 1129, 1137, n.18 (8th Cir. 1981). To impose such a requirement would emasculate the finding of classwide liability. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 361-62 (1977). As the Court of Appeals for this Circuit has stated, "where a Title VII defendant is proved a discriminator as a matter independent of the plaintiff's claim of discriminatory denial of a tangible job benefit, the court should ease the plaintiff's burden on that latter claim." *Bundy* v. *Jackson*, *supra*, 641 F.2d at 952. When the individual discriminatee comes forward with evidence of job opportunities that were denied to him or her, it is appropriate to require the defendants to prove by clear and convincing evidence that there were nondiscriminatory reasons for the defendants' employment decision. *Bundy* v. *Jackson*, *supra*, 641 F.2d at 953; *Nanty* v. *Barrows*, *supra*, 660 F.2d at 1333.

Fifth. Defendants finally[6] complain that they were not given an adequate opportunity for evidentiary hearings on the question of relief. Defendants of course had such an opportunity during the trial and, as the Court observed in its April 16 opinion, it thereafter merely afforded the parties an opportunity for the submission of further memoranda on this issue. Plaintiff attached to its memorandum a report of its expert which explained the relief aspects of the theory that this individual had advanced when he testified as an expert witness at the trial. In any event, defendants will have a full opportunity to submit evidence on the issue of the form of regression which will most fairly reflect the injury suf-

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[6] Defendants also point out, correctly, that in its restatement on October 20, 1981, of the liability found in the April 16, 1981 Opinion, the Court erred. As the remainder of the October 20 Memorandum makes clear, liability was found only with respect to initial grade placements and promotions. The reference to performance evaluations, job assignments, and award procedures in the Memorandum will be stricken.

fered by the class as a consequence of defendants' actions (see October 20 memorandum, pp. 9-10).

Defendants' motion for reconsideration is untimely (see note 3 *supra*) and it fails to provide any basis either for reconsideration of the Court's previous rulings or for a new trial.[7]

II

In the decision of April 16, 1981, in which the Court found defendants liable with respect to the class, it also ruled that two of the individual plaintiffs were entitled to relief and that the claims of the remaining three plaintiffs lacked merit and would be dismissed. One of the plaintiffs against whom judgment was entered—Yvonne G. Trout—thereupon took the appeal. The Court of Appeals issued an order on January 2, 1982, which provided, *inter alia*, that Ms. Trout's appeal in No. 81-1531 would be held in abeyance pending her application to this Court for a certification under Federal Rule of Civil Procedure 54(b) and the Court's ruling thereon. On February 1, 1982, Ms. Trout filed the appropriate petition with this Court.

Rule 54(b) provides in pertinent part that when more than one claim is presented, the court may direct the entry of final judgment as to one or more but fewer than all of the claims or parties upon its express determination that there is no just reason for delay and an express direction for the entry of judgment. The Trout claim, while in one sense intertwined with the claims of the class and those of the other individual plaintiffs, in another, is sufficiently separate that the entry of a final, appealable judgment would be warranted. Moreover, as

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[7] The defendants appear to concede that their motion is addressed to the Court's discretion. See Memorandum of Points and Authorities, pp. 5-9. See also *Wilson* v. *Thompson*, 638 F.2d 801, 803 (5th Cir. 1981); *Audiovisual Publishers, Inc.* v. *Cenco, Inc.*, 580 F.2d 50, 52 (2d Cir. 1978); 6A Moore's Federal Practice ¶ 59.08[3] at 59-114 (1979); 7 Moore's Federal Practice ¶ 60.23[4] at 273 (1979).

the discussion in Part I *supra* indicates, the ultimate disposition of the class action is likely to be substantially delayed on account of the government's decision to appeal the findings of this Court in advance of the relief stage. There is thus no just cause for delay with respect to the Trout action. It should also be noted that the government has no objection to the granting of the Trout petition.

III

For the reasons stated, it is this 8th day of March, 1982,

ORDERED That defendants' motion for reconsideration be and it is hereby denied, and it is further

ORDERED That the petition of Ms. Trout for certification under Rule 54(b) will be granted.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge